No. 84-1403

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In the Supreme Court of the United States

OCTOBER TERM, 1984

MANUEL ERIC VILLANUEVA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Did the drafters of the federal racketeering statute (RICO) intend to include marijuana offenses in the definition of "racketeering activity" codified at 18 U.S.C. § 1961(1)?

PARTIES BELOW

In addition to the United States of America, the following persons were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit, the court whose judgment is sought to be reviewed:

Manuel Eric Villanueva
Gustavo J. Fernandez
Manuel W. James
Russell Hobson III
Antonio E. Bascaro
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OPINION BELOW

The opinion of the Court of Appeals is reported at 742 F.2d 1335 (11th Cir. 1984). It is reproduced in the Appendix to this petition at App. 1-50.

JURISDICTION

The judgment sought to be reviewed was dated and entered October 1, 1984. Rehearing and rehearing en banc were denied by an order of the Eleventh Circuit issued and filed December 6, 1984. App. 51. The statutory provision which confers jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following pertinent statutes are reproduced in the Appendix:

18 U.S.C. §§ 1961(A), (D); (4); and (5) appear at App. 53;

18 U.S.C. §§ 1962(c) and (d) appear at App. 53-54.

STATEMENT OF THE CASE

Manuel Eric Villanueva was allegedly involved in an organization which imported and distributed marijuana between 1977 and 1978. Villanueva was indicted in 1981 for violations of 18 U.S.C. § 1962(d) (RICO conspiracy); 18 U.S.C. § 1962(c) (substantive RICO violation); 21 U.S.C. § 848 (continuing criminal enterprise); 21 U.S.C. § 960 (conspiracy to import marijuana); 21 U.S.C. § 952(a) (importation of marijuana); 21 U.S.C. § 846 (conspiracy to possess marijuana); 21 U.S.C. § 841(a) (possession of marijuana); 21 U.S.C. § 843(b) (unlawful use of a communication facility); and 18 U.S.C. § 1952 (interstate travel in aid of racketeering activity).

The government's theory before the district court—whose jurisdiction was based upon 18 U.S.C. § 3231—was that an organization existed for the purpose of importing large quantities of marijuana into the United States from Colombia, South America. Villanueva, Bascaro and one Jose Acosta were characterized as the organizers and principal decision-makers of the organization. The operation involved shrimp boat owners who imported marijuana, individuals in charge of unloading and storing the marijuana, individuals in charge of selling the marijuana and still others who purchased the marijuana. The 30-count indictment charged a total of twelve persons with having participated in this operation.

Villanueva was tried in 1982 and found guilty of RICO conspiracy, a completed RICO substantive offense, conspiracy to import marijuana, possession of marijuana with intent to distribute, conspiracy to possess marijuana with intent to distribute, engaging in a continuing criminal enterprise and interstate travel in aid of a racketeering enterprise. He was sentenced to a term of 60 years' imprisonment and a $220,000 fine.

Villanueva was convicted of violating two provisions of 18 U.S.C. § 1961 *et seq.*, the Racketeer Influenced and Corrupt

Organizations Act (RICO): a substantive violation of 18 U.S.C. § 1962(c) by conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity, and conspiring to violate 18 U.S.C. § 1962(c). These convictions were premised upon the government's allegations that the petitioner had been involved in the marijuana trafficking organization described above. The government employed these allegations as predicates for the assertion that Villanueva had engaged in a "pattern of racketeering activity" as defined by the statute. *See* 18 U.S.C. § 1961(5).

The petitioner sought to overturn his racketeering convictions in the Court of Appeals on the grounds, *inter alia*, that marijuana offenses cannot be used as predicate offenses under the RICO statute. The Court of Appeals rejected petitioner's argument. It is this issue for which petitioner requests the Court's review.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals' Decision Is Irreconcilable With The Clear Legislative History Of The Federal Racketeering Statute; For That Reason The Decision Presents An Important Issue Of Federal Law Which Can Only Be Conclusively Determined By This Court.

The Court of Appeals rejected petitioner's argument on the impermissibility of employing marijuana offenses as RICO predicates, holding that it was foreclosed by the decision in *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981). With all deference to the doctrine of *stare decisis*, this holding is incorrect and unsatisfactory. It is incorrect because the issue which petitioner raised was neither argued nor decided in *Phillips*: The appellant in *Phillips* had argued that marijuana offenses were not "within the ambit of RICO because marijuana is not a narcotic or dangerous drug." 664 F.2d at 1039. In a rather cursory passage, the Fifth Circuit rejected this argument because it found that "marijuana has

been classified as a Schedule I controlled substance." *Id.* From this finding the Court then concluded that "[m]arijuana may be the subject matter of a RICO charge." *Id.* at 1040.

Whatever the merits of this argument and holding, it is clear that the issue which petitioner raised in his brief was not addressed in *Phillips*. It is, therefore, equally clear that the *Phillips* holding did not foreclose the issue raised by the petitioner. *See, e.g., Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor relied upon, are not to be considered as having been so decided as to constitute precedent."); *see also United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952).

However, it is not the petitioner's intent to challenge the Court of Appeals' utilization of the *Phillips* holding. It is, instead, petitioner's goal to secure review of the result produced by the Court of Appeals' utilization of the *Phillips* holding. Petitioner argues that the Court of Appeals' action was incorrect because it foreclosed review of an important issue of law, namely, the proper construction of 18 U.S.C. § 1961(1)'s definition of "racketeering activity."

The Court of Appeals' action is also unsatisfactory because by refusing to consider the appropriate construction to be given to 18 U.S.C. § 1961(1)'s definition of racketeering activity, the Court of Appeals effectively gave its imprimatur to what the petitioner argues is an incorrect construction of that definition. This is an unsatisfactory state of affairs because it permits the government to employ marijuana offenses as predicates for RICO charges, a situation which is a direct contravention of the legislative intent responsible for the statute.

A. The Legislative History Of The Statute Unequivocally Establishes That Congress Did Not Intend That Marijuana Offenses Be Included In 18 U.S.C. § 1961(1)'s Definition Of Racketeering Activity.

The Racketeer Influenced and Corrupt Organization statute is an enactment of labyrinthine genealogy. Because that genealogy has been traced in great detail elsewhere, it will not be explored in unnecessary depth here. *See, e.g.*, Blakey, *Materials on RICO: Criminal Overview*, 1 Techniques in the Investigation of Organized Crime 58-105 (Cornell Institute on Organized Crime, Blakey ed. 1980); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L. Q. 1009, 1014-20 (1980); Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 837-45 (1980).

What is explored below are two crucial aspects of the statute's history, namely, the social forces providing the impetus for such an enactment and the unsuccessful proposals that preceded the introduction of what would become the RICO statute.

1. Legislative History: A Selective Review

RICO was a product of the nation's discovery of organized crime, a discovery that began in 1951 with the disclosures of the Kefauver Committee, progressed through Joseph Valachi's revelations about "La Cosa Nostra" and culminated with the report and recommendation submitted by the President's Commission on Law Enforcement and Administration of Justice [hereinafter, "the Commission"]. *See, e.g.*, Blakey, *Materials on RICO, supra*, at 70-72 and Bradley, *Racketeers, Congress, and the Courts, supra*, at 837-39; *see also* President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* (1967) [hereinafter, "*Organized Crime*"]. A major concern that grew out of this discovery was organized crime's infiltration of legitimate businesses, an infiltration described in some detail in the Commission's reports. *See, e.g., Organized Crime* at 4; *see also* S. Rep. No. 141, 82d Cong., 1st Sess. 33 (1951).

According to the Commission, an important means for effectuating this infiltration was the investment of "concealed profits acquired from gambling and other illegal activities" in legitimate business operations. *Organized Crime, supra*, at 4; *see also* President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 190 (1967) [hereinafter, "*Challenge*"]. The Commission recommended that new measures be developed to combat this infiltration. *Challenge, supra*, at 208.

In 1967 two bills were introduced in an attempt to implement the Commission's recommendations: S. 2048 proposed an amendment to the Sherman Antitrust Act prohibiting the investment of "intentionally unreported income" in "any business enterprise." S. 2048, 90th Cong., 1st Sess. (1967). Its companion, S. 2049, prohibited the acquisition of an interest in a business affecting interstate commerce with income derived from "criminal activity." S. 2049, § 1 (No. 1), 90th Cong., 1st Sess. (1967). "Criminal activity" was defined as including "the manufacture, importation, receiving, concealment, buying, or otherwise dealing in *narcotic drugs or marihuana*." *Id.* (emphasis supplied).

The two bills were referred to the Senate Committee on the Judiciary, where they died without being acted upon.[1] 113 Cong. Rec. 18007 (1967); Blakey, *Materials on RICO, supra*, at 78. The Antitrust Section of the American Bar Association conducted its own analysis of the bills, however, and concluded that, while antitrust-style measures were an appropriate means for attacking illegitimate infiltrations of legitimate businesses, such means should be contained in independent criminal statutes rather than appended to the Sherman Antitrust Act. *See House Hearings on S. 30*, 91st

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[1] Bills paralleling the provisions of S. 2048 and S. 2049 were introduced in the House by Congressman Poff. H. R. 11766 and H. R. 11268, 90th Cong., 1st Sess., 113 Cong. Rec. 17976 (1967). Senator Hruska was responsible for the introduction of both S. 2048 and S. 2049. 115 Cong. Rec. 6993 (1969).

Cong., 2d Sess. 149 (1970); Blakey, *Materials on RICO, supra*, at 78.

In 1969 Senator McClellan, joined by Senators Hruska, Allen and Ervin, introduced S. 30 into the 91st Congress; the bill was a response to a number of other recommendations presented by the Commission, and reflected Senator McClellan's long-standing interest in organized crime.[2] *See* 115 Cong. Rec. 5877 (1969) (remarks of Senator McClellan upon the introduction of S. 30). S. 30, entitled the Organized Crime Control Act of 1969, was a general reform bill intended to eliminate existing difficulties in prosecuting organized crime figures by remedying existing "defects in the evidence gathering process." 115 Cong. Rec. 5877 (1969); S. 30, 91st Cong., 1st Sess. (1969).[3] S. 30 did not originally contain RICO-style provisions intended to combat the infiltration of legitimate business. Blakey, *Materials on RICO, supra*, at 79-80.

On March 20, 1969 Senator Hruska, who had sponsored the by-now defunct S. 2048 and S. 2049, introduced S. 1623, entitled the Criminal Activities Profits Act. S. 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6995-96 (1969). S. 1623 combined the concepts contained in S. 2048 and S. 2049 into a

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[2] Senator McClellan had a long involvement with the problem of organized crime: It was the McClellan Committee which documented the infiltration of labor unions by organized crime, and it was the McClellan Committee which was responsible for eliciting Joseph Valachi's public revelations regarding the existence and operation of "La Cosa Nostra." *See* S. Rep. No. 1784, 87th Cong., 2d Sess. (1962); S. Rep. No. 1417, 85th Cong., 2d Sess. (1958); *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcommittee on Investigations of the Committee on Government Operations*, 88th Cong., 1st Sess. (1963).

[3] As introduced, S. 30 contained nine titles and encompassed such areas as grand jury operations, immunity, contempt, false statements, witness protection, depositions and increased punishment for "organized crime offenders." *See* S. 30, 91st Cong., 1st Sess., 115 Cong. Rec. 39906–07 (1969).

single bill, retaining S. 2049's definition of "criminal activity" as including "the manufacture, importation, receiving, concealment, buying or otherwise dealing in *narcotic drugs or marihuana.*" S. 1623, 91st Cong., 1st Sess. §2 [sic] (1) (1969); 115 Cong. Rec. 6993 (1969) (remarks of Senator Hruska upon introduction of S. 1623) (emphasis supplied). Hearings were held by the Senate on S. 30 and S. 1623 and as a consequence of those hearings a replacement bill was drafted and introduced by Senators McClellan and Hruska. Blakey, *Materials on Rico, supra*, at 80; *see also* 115 Cong. Rec. 9567 (1969) (remarks of Senator McCelian upon introduction of S. 1861).

S. 1861, introduced on April 18, 1969, provided criminal penalties for engaging in any of three varieties of "[p]rohibited racketeering activities": (1) using income "derived . . . from a pattern of racketeering activity" to acquire an interest in/establish/operate any enterprise engaged in or affecting interstate commerce; (2) acquiring or maintaining an interest in or control of such an enterprise through a pattern of racketeering activity; and (3) conducting or participating in the conduct of such an enterprise's affairs through a pattern of racketeering activity. S. 1861, § 1962(a)-(c), 91st Cong., 1st Sess. (1969), included in *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1816, S. 2022, S. 2122 and S. 2292 Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess., 66-67 (1969) [hereinafter, "*Measures Relating to Organized Crime*"]. A "pattern of racketeering activity" consisted of one act of racketeering activity. *Id.* at 65.

"Racketeering activity" was defined as including any of a list of offenses proscribed in various sections of the United States Code, none of which related to narcotics, marijuana or any other controlled substance, and as including the following conduct: "Any act involving the danger of violence to life, limb or property, indictable under State or Federal law and punishable by imprisonment for more than one year."

Id. at 63. S. 1861 and other organized crime bills were referred to the Subcommittee on Criminal Laws and Procedure of the Senate Judiciary Committee, where S. 1861 was the target of critiques and recommendations from various sources. 115 Cong. Rec. 6925, 9512 (1969); *Measures Relating to Organized Crime, supra*, at 268, 405-06, 475-77.

One source was the Justice Department: In a letter to Senator McClellan, Deputy Attorney General Richard G. Kleindienst presented the Department's views on S. 1861. *Measures Relating to Organized Crime, supra*, at 404-08. The letter included two recommendations pertinent to this discussion. The first resulted from the Justice Department's conclusion that S. 1861's definition of "racketeering activity" as including "any act involving the danger of violence to life, limb or property . . . " was too broad to withstand constitutional scrutiny. *Id.* at 405. Therefore, the Department recommended that this proviso be replaced with the following language: "The term 'racketeering activity' means . . . any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, usury or *dealing in narcotic drugs, marihuana or other dangerous drugs.*" *Id.* (emphasis supplied). The second recommendation resulted from the Department's conclusion that S. 1861 erred in defining a "pattern of racketeering activity" as consisting of one act of racketeering activity; the Justice Department recommended that the term be redefined to require "at least two such acts." *Id.*

After concluding its hearings on S. 1861 and similar proposals, the Senate incorporated the provisions of S. 1861 into S. 30; S. 1861 became title IX of S. 30, which passed the Senate on January 23, 1970 as the Organized Crime Control Act of 1970. Blakey, *Materials on RICO, supra*, at 92-95; Bradley, *Racketeers, Congress, and the Courts, supra*, at 842-43. Along with incorporating S. 1861 into S. 30, the Senate made certain revisions in S. 1861: One of these was redefining "pattern of racketeering activity" to require "at least two acts of racketeering activity." *Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess. 52

(1970) [hereinafter, "*House Hearings*"]. This, of course, followed the recommendation presented by the Justice Department.[4]

A second revision altered S. 1861's definition of "racketeering activity." The definition's inclusion of a list of proscribed offenses defined by the United States Code was retained and expanded.[5] *House Hearings, supra*, at 50-51. And, even more importantly, the definition was rewritten to incorporate the major part of the Justice Department's recommendation concerning the non-list proviso. That is, the definition was revised to include the following language: " '[R]acketeering activity' means . . . any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, *or dealing in narcotic or other dangerous drugs.*" *House Hearings, supra*, at 50 (emphasis supplied). This, of course, adopts the exact language employed in the Justice Department's recommendation except for the omission of two items: Usury is omitted from the list, and marijuana is omitted from the Justice Department's inclusion of it between "narcotic" and "other dangerous drugs." *See, e.g., Measures Relating to Organized Crime, supra*, at 405. The

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[4] For the Committee's explanation of why it adopted the Justice Department's recommendation, *see* Senate Committee on the Judiciary, *Report on the Organized Crime Control Act of 1969*, S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969) [hereinafter, "S. Rep. No. 617"].

[5] This aspect of the definition was expanded in two regards: The list of specified offenses was increased and the following new language was added to that list: "any offense involving . . . the manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in *narcotic or other dangerous drugs*, punishable under any law of the United States." *House Hearings, supra*, at 51 (emphasis supplied); *compare* the language in S. 1861, *Measures Relating to Organized Crime, supra*, at 63-64. This language should be compared to the language of two precursor bills, S. 2049 and S. 1623, both of which refer to "the manufacture, importation, receiving, concealment, buying or otherwise dealing in *narcotic drugs or marihuana*." S. 2049, 90th Cong., 1st Sess. (1967); S. 1623, 91st Cong., 1st Sess. (1969) (emphasis supplied).

significance of this latter omission is explored in some detail in §2, *infra*.

After its passage in the Senate, S. 30 was sent to the House, which referred it to the Committee on the Judiciary for study. 116 Cong. Rec. 1103 (1970). The House approached S. 30 with some reservations, reservations based upon a number of similar bills that had been introduced in the House. Blakey, *Materials on RICO*, *supra*, at 95-97. Beginning with the House's counterparts of S. 2048 and S. 2049, *see* n.1, *supra*, a series of bills had been introduced into the House that were intended to prevent the illegitimate infiltration of American business.

H.R. 11766 and H.R. 11268, the House analogues, respectively, of S. 2048 and S. 2049, were introduced in 1967 and suffered the same fate as the Senate bills. *See* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations*, *supra*, at 1016 n.27. Analytically, these precursor bills are separable into two categories. One category, consisting of ten different measures introduced during 1969, mimicked the language of S. 2049 by prohibiting the investment of funds derived from "criminal activity" in legitimate businesses; "criminal activity" was defined as "any act involving murder, kidnapping, extortion, bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, or otherwise *dealing in narcotic drugs or marihuana*." *See* H.R. 326, 91st Cong., 1st Sess. (1969); H.R. 760, 91st Cong., 1st Sess. (1969); H.R. 2154, 91st Cong., 1st Sess. (1969); H.R. 2697, 91st Cong., 1st Sess. (1969); H.R. 2794, 91st Cong., 1st Sess. (1969); H.R. 5216, 91st Cong., 1st Sess. (1969); H.R. 7596, 91st Cong., 1st Sess. (1969); H.R. 9327, 91st Cong., 1st Sess. (1969); H.R. 9710, 91st Cong., 1st Sess. (1969); H.R. 10077, 91st Cong., 1st Sess. (1969) (emphasis supplied).

The second category of House bills commenced with measures stressing rather unspecific concerns about the evils of organized crime, *see, e.g.*, H.R. 9704, 91st Cong., 1st Sess. (1969), progressed through the House's version of S. 1861, *see, e.g.*, H.R. 10723, 91st Cong., 1st Sess. (1969), and culminated in six proposals that paralleled the final version of S. 30.

H.R. 15507, 91st Cong., 2d Sess. (1970); H.R. 15698, 91st Cong., 2d Sess. (1970); H.R. 16134, 91st Cong., 2d Sess. (1970); H.R. 17541, 91st Cong., 2d Sess. (1970); H.R. 18279, 91st Cong., 2d Sess. (1970); H.R. 18517, 91st Cong., 2d Sess. (1970). Each of these six proposals paralleled the final version of S. 30 in defining "racketeering activity" in terms of "*dealing in narcotic or other dangerous drugs*" and in terms of "any offense involving . . . the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in *narcotic or other dangerous drugs.*" *See House Hearings, supra*, at 1104-05; 1179-80; 1259-60; 1372-73; 1438-39; and 1513-14 (emphasis supplied); *see also*, H.R. 19215, 91st Cong., 2d Sess. (1970) and H.R. 19586, 91st Cong., 2d Sess. (1970).

The House considered S. 30 at length, and adopted a number of revisions, none of which is pertinent to the issue under consideration. *See* Blakey, *Materials on RICO, supra*, at 97-104. On October 7, 1970 the House passed S. 30 as amended; S. 30 was approved by the Senate on October 12, 1970 and was signed into law by the President on October 15, 1970. Bradley, *Racketeers, Congress and the Courts, supra*, at 844-45 n.32; 116 Cong. Rec. 35340, 35347 (1970). The RICO statute created by title IX of S. 30 defines "racketeering activity" as including "(A) any act or threat involving . . . *dealing in narcotic or other dangerous drugs*" and "(D) any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise *dealing in narcotic or other dangerous drugs.*" 18 U.S.C. § 1961(1)(A), (D) (emphasis supplied). Nowhere is marijuana mentioned.

2. The Legislative History of the RICO Statute Conclusively Establishes that Marijuana Offenses are not Included in the Statute's Definition of Racketeering Activity.

It must already be apparent, even from this necessarily cursory review of legislative history, that marijuana offenses were not intended to be encompassed within RICO's definition of racketeering activity. Before extrapolating upon the inevitability of this conclusion, it is necessary to review some basic premises of statutory construction.

Statutory construction begins with a single, controlling premise, a premise that describes the respective roles which the legislature and the courts play in law-making: The legislature's role is to enact those measures which it deems necessary and proper; the courts' role is to "ascertain the Congressional intent [underlying these enactments] and give effect to the legislative will." *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *see also*, 2A *Sutherland Statutory Construction* § 45.05 (1984 rev.); R. Dickerson, *The Interpretation and Application of Statutes* 1-33 (1975). Implicit in this proposition, of course, is the generally unarticulated but fundamental assumption that legislative actions are purposive; though itself unarticulated, this assumption is the source for such specific rules of statutory construction as that which holds that the legislature "will not be presumed to have done a vain and useless thing." *See, e.g.*, *Rittenberry* v. *Lewis*, 222 F. Supp. 717, 719 (E.D. Tenn. 1963), *aff'd*, 333 F.2d 573 (6th Cir. 1964); *Kish* v. *Montana State Prison*, 161 Mont. 297, 505 P.2d 891 (1973); *see also International Telephone & Telegraph Corporation* v. *American Telephone & Telegraph Co.*, 444 F. Supp. 1148, 1154-55 (S.D.N.Y. 1978) (Courts must "assume that every Congressional enactment is purposive.").

This presumption against inadvertence finds expression in other rules employed in statutory construction, one of which concerns omissions in the language of a statute. When confronted with omissions in the language of a statute, a court must interpret the language as written: "[O]ur problem is to construe what Congress has written. . . . It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases, More or Less, Each Containing Six Jars of Jam* v. *United States*, 340 U.S. 593, 596 (1951); *see also Doski* v. *Goldseker*, 539 F.2d 1326 (4th Cir. 1976); *Fisher Flouring Mills Co.* v. *United States*, 270 F.2d 27 (9th Cir. 1959). This principle is an aspect of the historic maxim of statutory construction, "*expressio unius est exclusio alterius.*" ("Expression of one thing is the exclusion of another." *Black's Law Dictionary*, 692 [4th ed., 1951]); *see, e.g.*, 2A *Sutherland Statutory Construction* § 47.23 (1984 rev.).

It is this presumption against legislative inadvertence which conclusively establishes that marijuana offenses were not intended to be included in the definition of racketeering activity ultimately codified at 18 U.S.C. § 1961(1). Section 1, *supra*, describes in some detail the processes which led to the enactment of the RICO statute. The initial legislative step in this process was the introduction of S. 2048 and S. 2049 in the Senate and of correlates in the House of Representatives. S. 2049 prohibited employing the proceeds of "criminal activity" to acquire interests in legitimate business and defined "criminal activity" as including "dealing in narcotic drugs or marihuana." S. 2049, 90th Cong., 1st Sess. (1967). Thus, the issue of marijuana offenses was introduced into the legislative deliberations of racketeering at the outset. The issue remained before the legislature, both the House and the Senate, throughout the three years of those deliberations: S. 2049, and its House correlate, was followed by a series of bills in both houses that phrased the activity to be banned as representing racketeering in terms of marijuana offenses. *See* § 1, *supra*; *see, e.g.*, S. 1623, 91st Cong., 1st Sess. (1969) and H. R. 326, 91st Cong., 1st Sess. (1969).

Indeed, the Justice Department called this issue to Congress' attention when it formally recommended that S. 1861's definition of "racketeering activity" be revised to include "*dealing in narcotic drugs, marihuana or other dangerous drugs.*" *Measures Relating to Organized Crime*, *supra*, at 405 (emphasis supplied). And the Senate acted on this recommendation: S. 1861's definition of "racketeering activity" was amended in almost-accordance with the Department's recommendation prior to S. 1861's incorporation into S. 30 and its embarkation upon its eventual career as a RICO statute. *See* n.5 and accompanying text, *supra*. However, the amendment omitted "marihauna" despite including almost all the rest of the Justice Department's recommendations. This omission cannot have been inadvertent; inadvertence is negated not only by the above-described presumption against inadvertence but also by the fact that the Department's recommendation included marijuana. This inclusion became omission only

through some conscious, volitional act; and such an act requires the inference of intentional exclusion. This inference is further supported by the fact that the Senate adopted, essentially verbatim, the Department's recommendation that "pattern of racketeering activity" be defined as consisting of *two* acts of racketeering activity. *See* n.4 and accompanying text, *supra*.

Adoption of the Justice Department's definition of "pattern of racketeering activity" reinforces the inference that the Senate was acting upon the Department's recommendation, an inference which is supported by certain statements to this effect in the legislative history. *See* n.4, *supra*. This, in turn, leads to the inference that the exclusion of terms included in those recommendations was an intentional act reflecting a conscious legislative purpose. This latter inference is buttressed by the *nature* of the omissions: Two terms were omitted from the Department's proposed version of the definition of "racketeering activity"; these terms were "marihuana" and "usury." *See, e.g., Measures Relating to Organized Crime, supra*, at 405 and *House Hearings, supra*, at 50.

The omission of usury from the list of predicate offenses was clearly a result of the incorporation of provisions governing "collection of unlawful debt." *See, e.g., Measures Relating to Organized Crime, supra*, at 65-67 and *House Hearings, supra*, at 52-55. The provisions on "collection of unlawful debt" would make the inclusion of usury in the section defining "racketeering activity" a redundancy; it is inferentially obvious that this is the reason for omitting usury from S. 30. And while the reasons for the omission of "marihuana" from the same section are not as immediately obvious, it is equally apparent that this was an intentional exclusion.[6] The purposive nature of this exclusion is apparent from an inclusion appended to the language of

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[6] Nor can this assessment be rebutted by the readily foreseeable counterargument that references to marijuana were deleted because Congress felt that inclusion of such a reference would be, at best, a useless redundancy since "dangerous drugs" subsumes marijuana. This counterargument is, itself, rebutted by two

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factors: One is the consistency with which marijuana was included in proposals that also included "dangerous drugs"; assuredly, this consistency gives rise to the inference that the inclusion was purposive and represented an additive function.

The second factor refers, again, to the "context" of the statute: As was described above, the RICO statute was the product of a general concern about the growth of organized crime and the attendant specific concern about organized crime's infiltration of legitimate business. *See* § 1, *supra.* Though information about organized crime's proliferation had been revealed as early as the 1951 Kefauver hearings, the concern with organized crime culminated with, and as a proximate result of, the reports produced by the President's Commission on Law Enforcement and Administration of Justice. *See* § 1, *supra.* Among those reports was one addressing the problem of drug abuse and organized crime's responsibility therefor. *See* President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Narcotics and Drug Abuse* (1967). The report carefully reviews the nature and effects of the various substances categorized as promoting "drug abuse." *Id.* at 1-5. In so doing, the report carefully distinguishes between "marihuana" and "dangerous drugs." *Id.* at 2-4.

"Dangerous drugs" refers to "three classes of nonnarcotic drugs that are habit-forming or have a potential for abuse because of their stimulant, depressant or hallucinogenic effect." *Id.* at 4. Dangerous drugs include, respectively, amphetamines, barbiturates, and LSD and mescaline. *Id.* at 4-5. Not only is marijuana treated as a separate category from dangerous drugs, it is given independent consideration both as a substance with the potential for abuse and as a substance with an uncertain relationship to crime, organized or otherwise. *See id.* at 12-14.

Because the RICO statute, and the preliminaries thereto, were based upon the concerns and information presented in the Commission's reports, it is inferentially apparent that the drafters of the statute operated upon the basis of the analysis presented in those reports. Therefore, it is equally apparent that Congress did *not* intend "dangerous drugs" to encompass marijuana.

S. 1861 prior to its incorporation into S. 30 and its transmission to the House: As originally proposed in the Senate, S. 1861 did not include what would become 18 U.S.C. § 1961(D)'s definition of "racketeering activity" as including "any offense involving . . . the manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs." *Measures Relating to Organized Crime, supra,* at 63-64.

The fact that this language was appended is of far less significance than is the form which the added language took: This language is identical to language appearing in the parallel definitional sections of S. 2049 and its House correlate, S. 1623 and at least ten of the precursor bills introduced in the House prior to the enactment of S. 30, *see* discussion *supra* at 11, except for *one* omission. That omission is the word "marihuana": All these prior measures employed the identical list of acts in regard to the specified substances, but each and every one of these measures concluded by referring to "dealing in narcotic drugs or marihuana." *See* § 1, *supra.*

It is of course true that there were six House measures that employed language identical to that eventually adopted as 18 U.S.C. § 1961(D). *See* § 1, *supra.* However, these measures were introduced into the House *after* the language in S. 1861 had been amended to incorporate these changes: S. 30, as amended, was passed in the Senate on January 23, 1970. Bradley, *Racketeers, Congress, and the Courts, supra,* 842-843. The six House measures in question were introduced on the following dates: H. R. 15507 (January 22, 1970); H. R. 15698 (February 5, 1970); H. R. 16134 (February 24, 1970); H. R. 17541 (May 7, 1970); H. R. 18279 (June 30, 1970); H. R. 18517 (July 20, 1970). It is clear, therefore, that these bills were emulating the language of S. 30, rather than the reverse.

And this means that the language eventually enacted as 18 U.S.C. § 1961(1)(D) can only have been adopted from the above-discussed precursor House and Senate bills, all of which refer to "narcotic drugs or marihuana." Though the

other language of these provisions was incorporated into S. 1861 cum S. 30 almost verbatim, "narcotic drugs or marihuana" was changed to "narcotic or other dangerous drugs." This is the second instance in which the drafters of S. 30, which became the present RICO statute with this language unaltered, intentionally omitted marijuana offenses from the definition of racketeering activity. It is, again, inferentially obvious that this omission was a conscious, volitional act, rather than one of inadvertence. It is equally apparent, inferentially, that the intent was to exclude marijuana offenses from the statute's coverage.

Though this parsing of the statute's legislative history leads to the irresistible conclusion that marijuana offenses were not intended to be included in the statute's definition of "racketeering activity," such a conclusion, without more, is rather unsatisfying in its analytical sterility. Given the irresistibility of the conclusion, the logical inquiry then becomes *why* this exclusion. The answer to this inquiry can be found in those long-ago discussed social forces that provided the impetus for the statute's enactment.

RICO was a product of the nation's concern about organized crime's infiltration of legitimate business; a primary means whereby this infiltration was effectuated was through the investment of proceeds from unlawful activities in legitimate enterprises. *See* § 1, *supra*. Congress undertook the enactment of a statute that would prevent this infiltration; the concern for preventing the employment of unlawfully-procured funds to take over legitimate businesses runs throughout RICO's legislative history. *See, e.g., House Hearings, supra,* at 86-87, 293, 401; *Measures Relating to Organized Crime, supra,* at 1-2, 387, 440-45, 493-501 (statement of Senator McClellan upon the provisions of S. 30).

This concern, however, is always expressed in terms of preventing the investment of funds from certain criminal activities in legitimate businesses. These activities, identified by the Commission as organized crime's most lucrative activities, included illegal gambling and the sale of narcotics.

See, e.g., Challenge, supra, at 187-96; 116 Cong. Rec. 952-72 (1970). Therefore, in striking at organized crime's ability to infiltrate businesses, Congress was concerned with drafting a statute that would encompass these activities; this concern also permeates the legislative history, and it is always phrased in terms of "narcotics," of the addictive opiates that provided a major source of income for organized crime. *See* 116 Cong. Rec. 952-72 (1970); 116 Cong. Rec. 575-82 (1970); *see also* 116 Cong. Rec. 35295 (1970) (" 'Racketeering activity' is defined to include a wide variety of crimes, both State and Federal, that are generally associated with organized crime"). Indeed, Senator McClellan, the guiding spirit of the statute, made this clear in his remarks concerning the need for the statute, made on the Senate floor and incorporated into the legislative history. *Measures Relating to Organized Crime, supra,* at 493-97.

Legislative history being what it is, it would be possible to belabor the above to the point of reader stupefaction. That is, fortunately, not necessary: The comments on the legislature's concern in enacting a RICO statute are only offered to explain *why* marijuana was not included in the statute's coverage. Marijuana was not included because it was not perceived as being a means by which organized crime obtained the funds required for its invasion of legitimate enterprise. *See generally* President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Narcotics and Drug Abuse* (1967).

The underlying concerns producing the enactment of the statute are artifacts legitimately employed in construing the meaning of that enactment. These concerns are an aspect of what one scholar refers to as the "context" of a statute. R. Dickerson, *The Interpretation and Application of Statutes* 103-24 (1975). Concerns such as those described above form relevant, albeit tacit, assumptions shaping the final enactment. *Id.* at 120-22. Consequently, these assumptions are essential in understanding the whys and wherefores of the final product. *Id.* However, because of their implicitness, assumptions

of this sort are frequently unavailable to those confronted with the task of interpreting a particular enactment.

In this instance, however, there are indicia of those assumptions. One such indicator is the social and legislative history sketched above. A second is the view of the draftsman of the statute, Professor Robert Blakey, who reports that marijuana was not intended to be included within the Act's coverage. Blakey, *Materials on RICO*, *supra*, at 24. Whatever the degree of deference accorded to the substance of Professor Blakey's views, the existence of those views certainly lends inferential credence to the above-described assessment of the contextual influences responsible for the statute, an assessment indicating the non-inclusion of marijuana offenses in the statute's coverage.

CONCLUSION

Petitioner believes that the issue presented in his petition is of great moment because it concerns the proper construction to be given to a pre-eminent federal criminal statute. This construction is of both great importance and great urgency given that a Court of Appeals has sanctioned an interpretation which is clearly antagonistic to Congress' intent in enacting the measure.

Only this Court can rectify the egregious error committed by the Court of Appeals, and only this Court can prevent the innumerable miscarriages of justice which will inevitably result from that error.

For all these reasons the petitioner respectfully requests that this Court grant review of this issue.

Respectfully submitted

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